Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Michael Anthony Alexander, *Petitioner,*
v.
The State Of Texas, *Respondent*

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas,
Austin, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state may—as part of a system of appellate review that it admittedly does not have to provide—establish a final, discretionary review by a court of last resort, which court then adopts a narrow standard significantly limiting the scope of such review; and, under those circumstances, may such court of last resort, without running afoul of due process, refuse to review an opinion of an intermediate court, that:

I. Purports to sanction police conduct in an alleged Fourth Amendment violation where the remedial objectives of exclusion are obvious and unmistakable, by means of implicitly creating a far-reaching *extension* of the good faith exception to the exclusionary rule; and,

II. Reveals violations of the Code of Judicial Conduct—primarily in failing to *comply with the law*—by declining to consider: (1) cited, controlling, evidence in the record of the case, and (2) cited, controlling, statutory and case law authority; and,

III. Places itself, by so ruling, squarely *within* the narrow standard which the court of last resort itself had decreed *would* invoke its discretionary review.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Michael Anthony Alexander, *Petitioner,*
v.
The State Of Texas, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in refusing to grant discretionary review in the case of Michael Anthony Alexander v. The State of Texas, Nos. 0963-94 and 0964-94, following the affirmance of Petitioner's conviction by the Fourteenth Court of Appeals of Texas.

OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals of Texas is reported at 879 S.W.2d 338, and is reproduced in the Appendix. The notice by the Court of Criminal Appeals of Texas refusing Petitioner's request for discretionary review is also copied in the Appendix.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its decision refusing Petitioner's request for discretionary review on Decem-

ber 21, 1994. No motion for rehearing was filed. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), and Petitoner understands his Petition for a Writ of Certiorari will be timely if postmarked March 21, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the Constitution of the United States, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTE INVOLVED

Section 30.05 of the Texas Penal Code (criminal trespass). This is reproduced in its entirety in the Appendix.

CITY ORDINANCE INVOLVED

Houston, Texas, Code of Ordinances, Sec. 32.41, governing the hours city parks and park facilities are open to the public. The most pertinent portions are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner raised two points of error before the Fourteenth Court of Appeals, contending that the trial court erred in denying his Motion To Suppress Evidence because the police had neither probable cause to arrest him, nor reasonable suspicion to detain him; thus the matter seized resulted from an illegal detention, arrest and search, in violation, *inter alia,* of his constitutional rights under the Fourth and Fourteenth Amendments of the Constitution of the United States.

When the Court of Appeals affirmed his conviction, Petitioner sought discretionary review from the Court of Criminal Appeals, raising the same two questions presented to the Court of Appeals, plus the following additional matters: Because of the wording of the opinion of the Court of Appeals, Petitioner also raised the question of whether "reasonable suspicion" can ever be a "lesser-included" situation *within* "probable cause."[1]

Stated another way, if they police lack probable cause because of a *mistaken* belief that one has, or is committing a crime, will that—alone, or perhaps combined with a single, other "movement," as likely innocent as incriminating—still give them "reasonable suspicion" to detain, providing, in effect, another "good faith exception" to the exclusionary rule.

Finally, Petitioner strongly questioned the Court of Appeals' repeated failure to consider cited, controlling evidence in the record of the case, and cited, controlling, statutory and case law authority.

A. Facts Giving Rise To The Arrest And Seizure

On July 15, 1992, Petitioner was sitting in his car with a female companion in Brock Park, a Houston City Park, at approximately 2:00 a.m., which was after the closing hour provided by

[1] The Court of Appeals seemed to lump the two standards together, saying the officers were "*initially suspicious* appellant and his companion were committing criminal trespass, and *as they approached* . . . " they claimed to observe a furtive gesture. But the facts, as we shall see, do not bear this out.

the Ordinance establishing city parks' "curfew."[2] The gate to the entrance of the park, however, was open.

Officer Roberts was the only witness to testify at the suppression hearing; thus, the statement of facts, containing only the motion to suppress evidence, is extremely short, simple, and clear-cut. And because there was no warrant, (SF: 5)[3] the State had the burden of proof, and the statement of facts is notable for essential evidence it does *not* contain, as well as fundamental questions which were not asked.

In addition, this Court may easily perceive how the particular fact situation involved is common, far-reaching, and offers considerable potential for abuse by the police, because it involves the use of city parks, by the public, at night, where gates are left open, there are no signs actually prohibiting entry, and the police conduct appears purposeful to employ the crime of criminal trespass (in the form of "curfew violations") as a vehicle to conduct searches.

Officer Roberts testified that on July 15, 1992, at about two o'clock in the morning, he, his partner, Officer Baker, plus Officers Morales and Mitchell in another unit, had "met down the road" and decided to check out Brock Park, 9800 Green River in Harris County, for "curfew violation." (SF: 7, 8)

In other words, these four officers were familiar enough with Brock Park to know in advance that the gate to the park *would be open* at that hour of the night (morning). They then made a conscious, group decision to go and *look for suspects*. Because when coupled with their actions immediately following this meeting, it is also clear that they believed that any person or vehicle they would find in the park would be *de facto* engaging in criminal conduct, and therefore subject to immediate detention and/or arrest, and search.

[2] Houston, Tex., Code of Ordinances, Sec. 32.41: "(a) No park or park facility shall be open to members of the public between the hours of 11:00 p.m. and 6:00 a.m. . . "

[3] The designation "SF" refers to the court reporter's transcription of the statement of facts at the suppression hearing in the trial court. The most pertinent portions are reproduced in the Appendix.

These four officers, in two police cars, one following the other, entered the park at the entrance depicted in "Defendant's Exhibit No. 1"[4] (SF: 13, 14) and "observed a vehicle . . . in violation of the curfew." (SF: 8,9)

Officer Roberts testified that Officer Mitchell was driving the lead vehicle, and "pulled in nose-to-nose, [with Petitioner's vehicle; then] he turned on his *overhead take-down lights*, the two spotlights mounted on the roof of his car . . . " Officer Roberts, following Officer Mitchell, then pulled up alongside Petitioner's vehicle and shined a spotlight into it. (SF: 9, 21) Officer Roberts testified he couldn't say why Officer Mitchell pulled in "nose-to-nose" with Petitioner's vehicle, but stated that he himself parked to the side of Petitioner's vehicle, and admitted it "would have been possible" for Officer Mitchell to have parked there as well. (SF: 16, 17)

Petitioner will presently show he was therefore *detained*, for Fourth Amendment purposes, at the moment Officer Mitchell pulled in "nose-to-nose," blocking his way, restraining his movement, and in addition turned on his emergency lights. In other words, the action of these four police officers reveals a concerted plan, indicating they believed they had a right to effect at least an *immediate* detention, if not a full arrest.

In this very brief, direct examination, Officer Roberts testified that when he turned on the spotlight, he observed Petitioner "scrambling as if he were trying to hide something under the seat." (SF: 9) He was concerned there might be a weapon, and while Officers Mitchell and Morales removed Petitioner from the car, he looked under the seat and "found under the edge of the seat, at the floor mat, a white plastic tube which was designed to act as a crack pipe . . . still hot from recent use." He testified he conducted such search "checking for a weapon." (SF: 10, 11) Finally, once the crack pipe was found, Petitioner was arrested for possession of a controlled substance. After this, the vehicle was "inventoried," whereupon some alleged "crack" was found wadded up in a kleenex "in the driver's door handle." (SF: 11)

[4] A series of photos, the *originals* of which are included in the record of the case.

B. Procedural History

As the opinion of the Court of Appeals states, "Appellant . . . was charged with the felony offense of possession of cocaine . . . . After his motion to suppress evidence was denied, the trial court accepted appellant's plea of guilty. Due . . . to this conviction, appellant's guilt was adjudicated for an earlier conviction for the offense of aggregate theft . . . for which he had originally received deferred adjudication. The trial court assessed punishment at four (4) years years for the possession of cocaine and eight (8) years for the adjudication of the aggregate theft . . . "

The Court of Appeals affirmed these convictions in a published opinion, but correctly held, *inter alia,* that because of the particular facts involved, the question of whether the trial court erred in denying Petitioner's motion to suppress was dispositive of whether the trial court erred in adjudicating his guilt in the prior aggregate theft case.

Petitioner raised his Federal Constitutional grounds, involving violations of his Fourth and Fourteenth Amendment rights, in his Motion to Suppress Evidence before the trial court, once again before the Court of Appeals, and finally before the Court of Criminal Appeals of Texas, in his petition seeking discretionary review.

As noted previously, the Court of Criminal Appeals refused to review the opinion of the Court of Appeals on the grounds Petitioner raised, and which were outlined in the initial part of the "statement of the case."

REASONS FOR GRANTING THE PETITION

This Court's decision in *Arizona v. Evans,* No. 93-1660, decided March 1, 1995, was its first major ruling involving the good faith exception to the exclusionary rule since *Illinois v. Krull,* 480 U.S. 340 (1987), followed *United States v. Leon,* 468 U.S. 897, (1984). Each of these cases was decided based on the proposition that the exclusionary rule has a separate nature from the Fourth Amendment itself, and each seeks to define the circumstances under which *exclusion* will in fact follow a Fourth Amendment violation.

These cases, however, did not involve good [or bad] faith "mistakes" by the *police*. *Leon* involved a [later determined invalid] search warrant issued by a presumably neutral magistrate, while *Krull* involved a presumptively valid statute later held to be unconstitutional.

Petitioner's case involves a "mistake" by the police themselves, and further, may have been deliberate, or at the very least, negligent. And despite whatever subjective understanding the four officers in question may have had, it is hard to imagine any court finding their actions to be "objectively reasonable."

Therefore, considering the great diversity and conflict among the circuits on the question—which Petitioner will presently review briefly—the case at bar may well provide this Court with a ripeness, plus the type of factual scenario, that will permit something in the nature of an actual "bright line rule" to be fashioned, settling an interesting, important and much-discussed question.

This question, however, falls within a larger, more important, and yet much *less*-discussed question, for, to paraphrase the words of Justice Jackson in *Brinegar v. United States*, 338 U.S. 160, (1949), there are "many unlawful searches . . . of [often] innocent people . . . about which courts do nothing, and about which we never hear."

That question is, may a state court of last resort, without running afoul of due process, refuse to review a decision such as this, even in view of self-imposed limitations on the scope of its discretionary review. Petitioner will present his reasons he believes this Court should grant certiorari involving the overriding question first, followed by his reasons involving the good faith exception sub-question.

Let us begin by considering *why* Petitioner could possibly feel Justice Jackson's words are not only relevant, but overwhelmingly important to this and countless other cases "about which we never hear."

A. The Court of Criminal Appeals Discretionary Review Policy Violates Due Process

It is quite true that Texas Rule of Appellate Procedure, Rule 200, governing discretionary review in general by the Court of Criminal Appeals of Texas is very similar to, and seems patterned after, Supreme Court Rule 10, Considerations Governing Review On Writ Of Certiorari. But are the functions of those two courts really that similar?

In *Arcilla v. State*, 834 S.W.2d 357, (Tex. Cr. App., 1992), the Court of Criminal Appeals significantly limited its already limited discretionary review jurisdiction, announcing that "Our principal role as a court of last resort is the *caretaker of Texas law*, not the arbiter of individual decisions." It further established a clear-cut test for determining when it would grant review, and that test (slightly simplified to a more universal context) is perhaps best expressed in *Davis v. State*, 872 S.W.2d 743, (Tex. Cr. App., 1994), as follows: "On review, we ask whether the Court of Appeals fairly evaluated the *legal issues* considering *all relevant evidence* in the record." (Emphasis added)

With the greatest respect, Petitioner is compelled to first point out that the decision of the Court of Appeals in this case is not only erroneous, but completely fails to "fairly evaluate the legal issue(s) considering all relevant evidence in the record," as required by *Arcilla*, supra and *Davis*, supra.

In discussing the possibility that either probable cause, or reasonable suspicion, was provided by Section 30.05, Texas Penal Code (criminal trespass), the following is quoted from the Court's opinion:

> "(a) A person commits an offense if he enters or remains on property of another without effective consent and he:
>
> (1) had notice that the entry was forbidden . . . "

However, the Court *left out* the remaining applicable, and *controlling*, portion of the statute:

> "(b) For purposes of this section . . .
>
> (2) 'Notice' means . . .
>
> (B) Fencing or *other enclosure* obviously designed to exclude intruders . . .

(C) A *sign* or signs posted on the property . . . *reasonably likely to come to the attention of intruders, indicating that entry is forbidden."* (Emphasis added)

With regard to (B), above, the only evidence, by Officer Roberts, the only witness to testify, indicated that the gate to the park was open. In addition, there was *no* evidence presented to show that any "sign" stated that "entry was forbidden," and "was reasonably likely to come to the attention of intruders."

Second, the Court misstated the evidence in relating that the officers were "initially suspicious" that Petitioner was committing criminal trespass, and that *"as they approached . . ."* they observed him acting as if he were trying to hide something. The record is unambiguous that the above occurred only *after* the officers had pulled in "nose-to-nose" and turned on their "overhead take-down lights." (SF: 9, 21)

Third, the Court of Appeals ignored all the Officer's testimony on cross-examination relating to Petitioner's single possible furtive gesture ("scrambling as if to hide something"), in which he admitted that Petitioner could have been "setting a Coca-Cola down," or "picking up his keys or a cigarette," that in fact he could have been doing "anything." (SF: 17) In so testifying, he was admitting that Petitioner's actions were "as consistent with innocent activity as with criminal activity."

He also testified that *at this point* there was nothing that made him think there was any kind of *criminal activity* going on, "other than the curfew violation." (SF: 20).

Fourth, the Court ignored a great deal of repeatedly cited instructive and/or controlling case law. Regarding the "sign/notice question: *Morgan v. City Of DeSoto, Tex.*, 900 F.2d 811, (5th Cir., 1990). Although it is a civil, summary judgment case, a careful reading provides an excellent analysis of the amount of evidence necessary to satisfy a virtually identical burden of proof, in a very similar situation. There, the plaintiffs could have established a cause of action by proving the police officers involved didn't have probable cause to arrest them. The officers could have defeated that claim, through summary judgment, if a reasonable police officer could have believed plaintiffs had committed the crime of criminal trespass. Accordingly, from *Morgan*, at 814, 815:

"... That, in turn, depended upon whether the signs posted on the property indicated that entry was forbidden and were reasonably likely to come to the attention of intruders. It was not necessary that the sign be seen by the arrestee or that it be visible to them from any particular place. It was only required that there be a reasonable likelihood that a sign would "come to [their] attention." Texas Penal Code, Art. 30.05(b)(2)(C); *Bain v. State,* 677 S.W.2d 51, 58, (Tex. Cr. App., 1984)...

"... the *visibility* of the signs *and their messages* cannot be determined ... we conclude that a fact finder *could* find that a reasonable police officer would necessarily believe that no probable cause existed to arrest someone on these lots without a warning and order to leave." (Emphasis added)

Continuing, relating to the situation anyone in Petitioner's position would have found themselves in, on the night he was arrested:

"The fact finder could accept plaintiff's version of the facts as follows: The lots were used freely by the public during the day ... also used at night ... The ... signs were not likely to be seen *unless* one ... *looked* for them. At night they were difficult to read unless one were at the right place. Citizens could easily drive upon the lots without the slightest reason to believe they might be guilty of wrongdoing. And even if they happened to read one of the signs, they would not likely understand that a mere entry was a forbidden act, for which they could be charged with a crime.

"It follows that ... immunity of the ... officers was not established, and neither was *probable cause* for the arrests." (Emphasis added)

Regarding a single suspicious act never giving rise to "reasonable suspicion," *Gurrola v. State,* 877 S.W.2d 300, (Tex. Cr. App., 1994), was cited to the Court, contained at least three suspicious actions, and the court held there was no reasonable suspicion. In addition, *Holladay v. State,* 805 S.W.2d 464, (Tex. Cr. App., 1991), also cited, reiterated the rule that any one factor, standing alone, is not sufficient to support a finding of reasonable suspicion.

In *Evitts v. Lucey*, 469 U.S. 387, 401, (1985) this Court held:

> "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."

The Court of Criminal Appeals, in refusing to grant review, has, in view of the all of the foregoing, not only violated due process, but summarily violated its own standard set out in *Arcilla*, supra. The above demonstrates clearly that Court of Appeals failed to "fairly evaluate the legal issue(s) considering all relevant evidence in the record."

A member of this Court might well ask, "how," or "why" might members of the judiciary be moved to decide cases in this fashion? The answer is a simple one for those who work here in the trenches. Unlike Federal judges, these judges are elected officials who serve short terms before re-election. There is great public clamor over lawlessness, and every appellate judge knows his opponent will use as ammunition any and every conviction that that judge reverses. Many are highly principled, but some are unable to rise above the pressure, and unfortunately go to any lengths—even *dishonesty*—to affirm convictions.

The Code of Judicial Conduct mandates that "A judge *shall* comply with the law . . . [and] *shall not* be swayed by . . . public clamor, or fear of criticism." Canons 2 and 3.

Can it possibly be regarded as anything other than *deliberate* that the Court of Appeals left out of its opinion that portion of the Texas criminal trespass statute, Art. 30.05, Texas Penal Code, as well as *Morgan*, supra, and other cited cases, because that law would have made it very difficult for the court to affirm the conviction?

B. The Opinion of the Court of Appeals Implicitly Creates an Extension of the Good Faith Exception to the Exclusionary Rule

The *import* of the Court's decision—viewed in its totality, and in terms of Federal, constitutional principles—is to create another extension of the "good faith exception" to the exclusionary rule.

The Fifth Circuit was actually the first jurisdiction to adopt the exception in *United States v. Williams*, 622 F.2d 830, (1980). The Supreme Court followed in 1984 with *Leon*, supra. In warrantless arrests, the catch phrase is "objective reasonableness." There has never been recognized a *subjective*, good faith exception, and in addition, different circuits have different tests for determining objective reasonableness.

Further, Petitioner's arrest has the ring of a "pretextual" action, and in such a situation the Fifth, Seventh and Eighth Circuits utilize one test to determine objective reasonableness, while the Sixth, Ninth, Tenth and Eleventh utilize another. See, e.g., *U. S. v. Thomas*, 787 F. Supp. 663, (E.D. Tex. 1992), and *U. S. v. Ortiz*, 835 F. Supp. 824 (E.D. Pa. 1993) as being especially informative and instructive. In other words, there has never been recognized, by any court, such an extension of the good faith exception as the Court of Appeals in this case impliedly creates.

Which brings one back, full circle, to the purpose of the exclusionary rule itself, as reiterated in *Arizona v. Evans*, supra, which holds that its function is one of *deterrence:* "Exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served." *Id.*, at 63 LW 4183.

This was an *encroachment*, either negligent or deliberate, by the police in this case, amounting to a clear Constitutional violation. The State of Texas has established an appeal process, and its appellate courts are *"bound to interpret the United States Constitution." Id.*, at 63 LW 4181. But appeals as transpired in the case at bar are the same as no appeal at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

Affirmed and Opinion filed June 16, 1994

In The
Fourteenth Court of Appeals

No. A14-92-01275-CR
No. C14-92-01276 CR

MICHAEL ANTHONY ALEXANDER, Appellant
v.
THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Nos. 625,586 and 638,566

OPINION

Appellant, Michael Anthony Alexander, was charged with the felony offense of possession of cocaine in cause number 638,566. After his motion to suppress evidence was denied, the trial court accepted appellant's plea of guilty. Due in part to this conviction, appellant's guilt was adjudicated for an earlier conviction for the offense of aggregate theft in cause number 625,586, for which he had originally received deferred adjudication. The trial court assessed punishment at four (4) years for the possession of cocaine and eight (8) years for the adjudication of the aggregate theft in the Institutional Division of the Texas Department of Criminal Justice. In two points of error, appellant contends that the trial court erred in denying his motion to suppress evidence seized from an illegal arrest and search because the police lacked probable cause to arrest him and reasonable suspicion to detain him. We affirm.

Houston Police Officers Roberts and Baker, drove to Brock Park at 9800 Green River at approximately 2:00 a.m. in order to check the city park for curfew violators. Officers Morales and

Mitchell accompanied Officer Roberts to the park in a separate patrol vehicle.

As he entered the park following behind the other patrol vehicle, Officer Roberts observed a parked vehicle inside the park in violation of the curfew. Officer Mitchell pulled his patrol car in "nose-to-nose" with the suspect's vehicle, while Officer Roberts pulled up next to it and shined his police spotlight inside the vehicle. Officer Roberts observed appellant in the driver's seat and a female seated on the passenger side of the vehicle. Appellant "began scrambling as if he were trying to hide something under the seat" after the spotlight illuminated his car.

After Officers Mitchell and Morales removed appellant from the car, Officer Roberts checked appellant's vehicle for weapons in the area where appellant had been "scrambling." While checking the car for weapons, Officer Roberts discovered a crack pipe under the edge of the seat, and it was still hot from recent use. Upon discovering this contraband, appellant was arrested. A subsequent inventory of appellant's vehicle at the scene yielded some crack cocaine wrapped inside a tissue.

In his first and second points of error, appellant contends that the trial court erred in denying his motion to suppress evidence because the matter seized was the result of an illegal arrest and search in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, Article I, Section 9 of the Texas Constitution, and Article 38.23 of the Texas Code of Criminal Procedure. Specifically, appellant argues that the police lacked: (1) probable cause to arrest him for a "curfew violation" or criminal trespass when they approached his vehicle and ordered him out; and (2) reasonable suspicion to detain him prior to ordering him out of his vehicle. On the contrary, the State argues that they had reasonable suspicion to justify their initial stop and search.

In reviewing a ruling on a motion to suppress evidence, an appellate court views the evidence in the light most favorable to the trial court's ruling. *Green v. State*, 615 S.W.2d 700, 707 (Tex. Crim. App. 1980), *cert. denied*, 454 U.S. 952 (1981); *Posey v. State*, 763 S.W.2d 872, 874 (Tex. App.--Houston [14th Dist.] 1988, pet. ref'd). As a basis for ruling on a motion to suppress, the trial judge is entitled to believe or disbelieve any or all of a

witness' testimony, and the appellate court is not at liberty to disturb any finding supported by the record. *Rivera v. State*, 808 S.W.2d 80, 96 (Tex. Crim. App.), *cert. denied*, 112 S.Ct. 279 (1991); *Ryseijko v. State*, 782 S.W.2d 529, 532 (Tex. App.--Houston [14th Dist.] 1989, pet. ref'd). Furthermore, unless there is a clear showing of abuse of discretion, a trial court's ruling on the admissibility of the evidence should not be reversed. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

(The next portion of the opinion is not reproduced because it involves the adjudication of the aggregate theft offense and is not relevant to the matter before this Court.)

We must now determine if the initial detention of appellant was justified. Appellant argues that when the officers approached him and ordered him out of his vehicle, they lacked probable cause to arrest him. Appellant's argument is without merit. It is well established that an officer may briefly stop a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information. *Smith v. State*, 813 S.W.2d 599, 601 (Tex. App.--Houston [14th Dist.] 1991, pet. ref'd). An occupant of an automobile is just as subject to a brief detention as is a pedestrian. *Adams v. Williams*, 407 U.S 143, 148 (1972); *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983). Circumstances short of probable cause for an arrest may justify a temporary detention for the purpose of investigation. *See Gearing v. State*, 685 S.W.2d 326, 328 (Tex. Crim. App. 1985). As part of this temporary detention, an officer may ask that an individual step out of his automobile. *Id.* at 329; *Johnson*, 658 S.W.2d 626. Here, the officers request for appellant to get out of his vehicle was no more than a temporary detention for investigative purposes.

However, appellant seems to assert that he was immediately *arrested*, not detained, by the officers because he was not free to leave. Appellant argues that a detention occurred when Officer Mitchell pulled in "nose-to-nose" with his vehicle and turned on his emergency lights; or alternatively, when the officers ordered him out of his vehicle. It is true that a citizen subjected to an investigative detention is not free to leave and that such a detention is a "seizure" for pusposes of the Fourth Amendment. *Livingston v. State*, 739 S.W.2d 311, 327 (Tex. Crim. App.1987), *cert. denied*, 487 U.S. 1210 (1988). That is why an initial tempo-

rary detention must be justified by reasonable suspicion. *Ramirez v. State,* 672 S.W.2d 480, 482 (Tex. Crim. App. 1984). Here, such reasonable suspicion was established.

Appellant, however, argues that the officers had no reasonable suspicion to detain him. To justify a brief investigative detention, the officer must know specific, articulable facts, which in light of his experience and personal knowledge, together with reasonable inferences, would warrant detaining the suspect. *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Comer v. State,* 754 S.W.2d 656, 657 (Tex. Crim. App. 1986). Those specific facts must amount to more than a mere hunch or suspicion. *Id.* Even a temporary detention is not permissible unless the circumstances objectively support a reasonable suspicion that the person detained actually is, has been, or soon will be engaged in criminal activity. *Viveros v. State,* 828 S.W.2d 2, 4 (Tex. Crim. App. 1992); *Crockett v. State,* 803 S.W.2d 308, 301 (Tex. Crim. App. 1991). Circumstances raising suspicion of illegal conduct need not be criminal. *Id.* at 311. The issue is not whether the particular is innocent or criminal, but rather the degree of suspicion that attaches to particular noncriminal acts. *Holladay v. State,* 805 S.W.2d 464, 471 (Tex. Crim. App. 1991).

In the present case, Officer Roberts was the sole witness for the State at the motion to suppress hearing. He testified that the other officers and he drove to Brock Park at 2:00 a.m. to check the park for curfew violators. He also testified on cross-examination that there was a sign with a curfew on top of the right gate to the park. Upon arriving at the park, Officer Roberts saw appellant's vehicle parked inside the park in violation of the curfew. On cross examination, he also stated that the vehicle's lights were off, but he could not tell if the motor was running or if anyone was in it. As the officers got closer, they saw two people in the vehicle. Officer Roberts parked his patrol vehicle next to appellant's car and shined his police spotlight inside appellant's car. In the meantime, Officer Mitchell pulled his patrol vehicle in "nose-to-nose" with appellant's vehicle. As he shined his spotlight into appellant's car, Officer Roberts observed appellant "scrambling as if he were trying to hide something under the seat."

Based on these facts, the officers were justified in initially detaining appellant because appellant was in the park after the

11:00 p.m. curfew. The Houston Code of Ordinances provides in pertinent part:

> (a) No park or park facility shall be open to members of the public between the hours of 11:00 p.m. and 6:00 a.m. . . .
>
> (c) This section shall not be construed to create any independent criminal prohibition; however, any person found within any park or park facility outside the hours designated or permitted for its use who fails to leave immediately after being requested to do so or who is otherwise on notice that the park or park facility is not open to the public shall be subject to prosecution under Section 30.05 of the Texas Penal Code for criminal trespass in addition to prosecution for any other crime that may have been committed thereupon.

HOUSTON, TEX., CODE OF ORDINANCES Sec. 32.41 (1985) Section 30.05 of the Texas Penal Code describes the offense of criminal trespass as follows:

> A person committs an offense if he enters or remains on property or in a building of another without effective consent and he:
>
> (1) had notice that entry was forbidden; or
>
> (2) received notice to depart but failed to do so.

TEX. PENAL CODE Sec. 30.05 (Vernon 1974)

The record reveals that Officer Roberts and the other officers observed appellant in a city park, Brock Park, at around 2:00 a.m., three hours past the curfew established by city ordinance. Based of these facts, the officers were initially suspicious that appellant and his companion were committing criminal trespass, and as they approached, they observed him acting as if he were trying to hide something under the seat. Because these specific, articulable facts are sufficient to constitute reasonable suspicion, we find that the initial investigative detention of appellant was justified, as well as the subsequent search which we will now discuss.

As to the legality of the subsequent search of appellant's vehicle, appellant argues that it was constitutionally impermissible.

We disagree because it is clear that during the course of a temporary detention, an officer may conduct a limited search for weapons where it is reasonably warranted for his safety or the safety of others. *Terry*, 392 U.S. at 27; *Ramirez*, 672 S.W.2d at 482. Further, the officer may conduct a protective search of a detainee's vehicle when he has a reasonable belief, based on specific, articulable facts. that the detainee may pose a danger to the officer or to others. *See Goodwin v. State*, 799 S.W.2d 719, 728 (Tex. Crim. App. 1990).

Here, Officer Roberts testified that he observed appellant "scrambling as if he were trying to hide something under the seat." He also testified that he was immediately concerned that there might be a weapon in appellant's car because based on his experience as an officer, when someone is scrambling trying to hide something, it's either something illegal or a weapon. For his own safety, Officer Roberts looked under the seat of appellant's car after appellant exited the vehicle to check for weapons. Therefore, when Officer Roberts searched the passenger compartment of appellant's car, he had reasonable suspicion that appellant was committing the offense of criminal trespass and had exhibited certain gestures which, based on his experience indicated that appellant might be hiding a weapon. Under these circumstances, Officer Roberts was justified in condiucting the weapons search to neutralize them possible danger to the other officers and himself. Thus, the subsequent search was valid.

While searching the vehicle for weapons, Officer Roberts found a crack pipe under the edge of the appellant's seat at the floor mat. The crack pipe was still hot from recent use. If, while conducting a legitimate *Terry* search of the interior of the vehicle, the officer should, as here, discover contraband other than weapons, he clearly cannot ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. *Michigan v. Long*, 463 U.S. 1032, 1051 (1983). Once the crack pipe was found, Officer Roberts had probable cause to arrest appellant. *Ramirez*, 672 S.W.2d at 482; *See also* Tex. Code Crim. Proc. Ann. art. 14.01 (Vernon 1977). Consequently, Officer Roberts' search of the vehicle incident to that arrest was proper, and the cocaine seized as a result of the search was admissible. Thus, the trial court properly overruled appellant's motion to

suppress. Accordingly, we overrrule appellant's first and second points of error.

The judgment of the trial court is affirmed.

/s/ Joe L/ Draughn

Justice

Judgment rendered and opinion filed June 16, 1994

Panel Consists of Justices Robertson, Cannon and Draughn

Publish - Tex. R. App. P. 90

APPENDIX B

December 21, 1994

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0963-94
STYLE: ALEXANDER, MICHAEL ANTHONY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED

December 21, 1994

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0964-94
STYLE: ALEXANDER, MICHAEL ANTHONY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED

APPENDIX C

TEX. PENAL CODE Sec. 30.05. Criminal Trespass

(a) A person committs an offense if he enters or remains on property or in a building of another without effective consent and he:

(1) had notice that entry was forbidden; or

(2) received notice to depart but failed to do so.

(b) For purposes of this section:

(1) "Entry" means the intrusion of the entire body.

(2) "Notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden . . . .

HOUSTON, TEX., CODE OF ORDINANCES Sec. 32.41 (1985)

(a) No park or park facility shall be open to members of the public between the hours of 11:00 p.m. and 6:00 a.m. . . .

(c) This section shall not be construed to create any independent criminal prohibition; however, any person found within any park or park facility outside the hours designated or permitted for its use who fails to leave immediately after being requested to do so or who is otherwise on notice that the park or park facility is not open to the public shall be subject to prosecution under Section 30.05 of the Texas Penal Code for criminal trespass in addition to prosecution for any other crime that may have been committed thereupon.

APPENDIX D

Pertinent Portions of the Statement of Facts of the Motion To Suppress Evidence Hearing October 29, 1992

Direct Examination, testimony of Officer Roberts, SF: 7-10

"Q. (BY THE STATE) Where did you meet the Defendant?

"A. In Brock Park . . . .

"Q. Now, were you in your police car alone or with someone else?

"A. Officer Baker was in my car.

"Q. And were there any other officers involved?

"A. Yes, sir, Unit 58C38, which had Officers Morales and Mitchell there also.

"Q. How did the two units hook up together?

"A. We had met down the road and decided to check the park for curfew violation.

"Q. And the two car together?

"A. And the two cars; we followed each other.

"Q. And what did you do when you reached the park?

"A. As we entered the park, I observed a vehicle in the park in violation of the curfew, and approached the vehicle. Officer Mitchell was in front of me, and he pulled in nose-to-nose with the vehicle which was parked in the park, and I pulled up adjacent to it and shined a spot light into the vehicle . . . .

"Q. What was the Defendant doing?

"A. As we turned the spotlight on, he began scrambling as if he were trying to hide something under the seat . . . .

"Q. And were you concerned that there might be a weapon around?

"A. Yes, sir, I was.

"Q. Why were you concerned there might be a weapon?

"A. Experience indicates when someone is scrambling to hide something, it's either something illegal or a weapon.

"Q. Now let me ask you this: Is it an offense to be in the park after curfew hours?

"A. Yes, sir, it is . . . .

Cross examination, SF: 13-21

"Q. Were there signs present in this case?

"A. There was a sign posted at the entrance of the park . . . .

"Q. Now, would you just look at that first picture there and state whether or not you see a sign there which might depict the hours the park is open?

"A. No, sir . . . .

"Q. Now, if you would look through those pictures one by one . . . I'll ask you if you see any sign in those pictures which state the hours that the park is open?

"A. No, sir, I do not . . . .

"Q. Now, you said you shined your spotlight into the vehicle, and you said the Defendant looked as if he were trying to hide something?

"A. Yes, sir.

"Q. What exactly was he doing?

"A. He was leaned forward in the seat reaching underneath—fumbling around underneath the seat.

"Q. Could you see his hand?

"A. I could not see his hand.

"Q. Could you see his arm?

"A. I could see the beginning of his arm.

"Q. Could he have been setting a Coca-cola down on the floor?

"A. It's possible he could have been doing anything. He could have been hiding a weapon.

"Q. I understand. Could he have been picking up his keys or a cigarette which dropped down there?

"A. It's possible....

"Q. Now, could you see this vehicle from Green River Road?

"A. Not from Green River Road, no, sir....

"Q. And the truck was by itself; no other vehicles?

"A. There were no other vehicles.

"Q. Did the truck have its lights on or off?

"A. Lights were off.

"Q. Could you tell whether the motor was running?

"A. Could not tell.

"Q. Could you even tell if anybody was even in it at the time?

"A. When we first saw it, we could not tell if anyone was in it. As we got closer, we saw that there were two people in the vehicle . . . .

"Q. Was there anything that made you think there might be some kind of criminal activity at this point in time?

"A. At that point, other than the curfew violation, no, sir.

"Q. No trunk open, or people standing talking, or anything like that?

"A. No, sir . . . .

"A. As he pulled in nose-to-nose, he turned on his overhead take-down lights, the two spotlights mounted on the roof of the car, not the side spotlight. I operated my side spotlight.

"Q. I see. And it was at this point that you saw him leaning over?

"A. Yes, sir . . . .

Redirect examination, SF: 22

"Q. On the date in question, was there a sign that had a curfew on it for the park?

"A. Yes, sir, I believe there was.

"Q. And where was it located?

"A. On the gate--on the gate of the park . . .

"Q . . . Is this the gate right here?

"A. Yes, sir; it's on this gate.

"Q. It was on the right?

"A. On the right gate on top.

"Q. Do you recall what the sign said?

"A. I don't recall verbatim, no sir.

"Q. Have you been to city parks before this?

"A. Yes, sir.

"Q. And is it your experience that city parks have signs on them that do list a curfew?

"A. Yes, sir . . . ."